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CASE NO. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
LINCOLN ISAAC,
Respondent.

E.P. PERINI, Superintendent,
Marion Correctional Institution,
Petitioner,
v.
KENNETH L. BELL,
Respondent.

TED ENGLE, Superintendent,
Chillicothe Correctional Institute,
Petitioner,
v.
HOWARD HUGHES,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

II. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

PARTIES

In addition to the parties listed on the front cover of this brief, the Ohio Prosecuting Attorneys Association appeared as amicus on behalf of petitioner (then appellee) Engle in *Isaac v. Engle*, F. 2d , (No. 78-3488, 6th Cir. 1980) upon rehearing en banc. The Ohio Public Defenders Association and the Appellate Review Office, a subdivision of the clinical program of the School of Law of the University of Akron appeared as amici for respondent (then appellant) Isaac.

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OPINIONS BELOW

The decision of The United States Court of Appeals for The Sixth Circuit in *Isaac v. Engle*, F.2d (No. 78-3488), 6th Cir. 1980), upon rehearing en banc is not yet reported. (A1)[1] The panel decision of The United States Court of Appeals For The Sixth Circuit in *Isaac v. Engle, supra* is not yet reported (A24). The decision of the United States District Court For The Southern District of Ohio, Eastern Division in *Isaac v. Engle*, is unreported. (A38).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini*, (No. 79-3153, 6th Cir. 1980) is reported at 635 F. 2d 575. (A42). The decision of the United States District Court For The Northern District of Ohio, Western Division in *Bell v. Perini*, is unreported (A49).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle*, (No. 79-3570) is unreported. (A60). The decision of the United States District Court For The Northern District of Ohio, Eastern Division in *Hughes v. Engle* is unreported. (A63).

JURISDICTION

The panel decision of The United States Court of Appeals For the Sixth Circuit in *Isaac v. Engle, supra* was entered February 8, 1980. (A24). Rehearing en banc was granted March 24, 1980. (A36). The en banc decision in *Isaac v. Engle, supra* was entered December 12, 1980. (A1).

The decision of The United States Court of Appeals For The Sixth Circuit in *Bell v. Perini, supra* was entered December 12, 1980. (A42).

The decision of The United States Court of Appeals For The Sixth Circuit in *Hughes v. Engle, supra* was entered December 18, 1980. (A60).

Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

The petition for writ of certiorari was filed on February 23, 1981. Certiorari was granted by Order of April 20, 1981.

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[1]References to the appendix to the petition for writ of certiorari are designated as "A". References to the joint appendix to this brief are designated as "JA".

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code (Page's) Section 2901.05A (Eff. 1-1-74)

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.

Ohio Rev. Code (Page's) Section 2901.05A (Eff. 11-1-78)

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

Rule 30, Ohio Cr. R.P. (Am. 7-1-75)

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. Copies of such requests shall be furnished to all other parties at the time of making such requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.

A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52(b), Ohio Cr. R.P. (Eff.7-1-73)

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

ISAAC

Isaac was found guilty in a jury trial in Pickaway County, Ohio of aggravated assault, a lesser included offense of felonious assault for which he had been indicted. On September 15, 1975, Isaac was sentenced to a term of imprisonment of from 6 months to 5 years. During his trial, Isaac relied upon the affirmative defense of self defense. In opening argument, defense counsel presented to the jury the theory that the defense would prove its burden of proving self defense by a preponderance of the evidence, and in closing argument contended that such burden had been met. (Isaac Tr. 12, 189, 201)[2] The trial court gave the traditional instruction in Ohio that the defendant had to prove the affirmative defense of self defense by a preponderance of the evidence. The trial court further instructed that failure to meet such burden did not relieve the State of its obligation to prove the elements of the offense beyond a reasonable doubt. (Isaac Tr. 227-230)(JA 3-5). Despite various objections to the charge, including the definitional terms of self defense (Isaac Tr. 234, 235, 239-240), no objection was entered to the above charge.

Subsequent to conviction, Isaac appealed to the Court of Appeals of Pickaway County, Ohio. By a supplemental assignment of error, Isaac relied on the newly decided case of *State v. Robinson*, 47 Ohio St. 2d 103 (1976). In *Robinson*, the Ohio Supreme Court concluded as a matter solely of state statutory law that O.R.C. Section 2901.05(A)(eff. 1-1-74) changed the traditional common law preponderance burden of proof on affirmative defenses to require that a defendant only have the burden of coming forward with sufficient evidence to create an issue as to the affirmative defense.[3] The State then bore the burden of proof beyond a reasonable doubt, not only as to the statutory elements of the crime, but also as to the non existence of the affirmative defense. The Court of Appeals affirmed Isaac's conviction on the basis that he had failed to object to the instruction given. (JA6).

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[2]References to *State v. Isaac*, No. 75 CR-83, CCP, Pickaway County.

[3]In reaction to the *Robinson* decision, the Ohio legislature amended O.R.C. Section 2901.05, effective November 1, 1978, to return to the common law preponderance standard.

Isaac further appealed to the Ohio Supreme Court which denied relief on July 20, 1977. On the same day, the Ohio Supreme Court decided *State v. Humphries*, 51 Ohio St. 2d 95 (1977) holding that although the interpretation of O.R.C. Section 2901.05(A) worked by *Robinson* was fully applicable to all trials conducted after January 1, 1974, the effective date of the statute, a defendant who had not objected to the charge on that basis would be precluded from relief.

On March 31, 1978, Isaac filed a petition for writ of habeas corpus with the United States District Court For The Southern District of Ohio, Eastern Division. Therein Isaac alleged as his sole proposition the failure of the Ohio Courts to apply the *Robinson* decision to his case. The district court, on June 26, 1978 denied the petition, "because the record clearly establishes that petitioner waived his constitutional claim by failing to present it to the trial court". (A41). The district court further stated, "Petitioner has not made a showing of either cause or *actual* prejudice". (A41). Emphasis added.

Upon appeal, a panel of The United States Court of Appeals For The Sixth Circuit, on February 8, 1980, voted to reverse. (A24). The majority found error on the basis that the selective denial by the Ohio Supreme Court of the benefits of the *Robinson* decision was itself arbitrary and capricious and thus a denial of due process. (A26). As such, the majority did not consider the question of whether the instruction itself was a violation of due process. (A31). The concurrence (A33) found error on the basis that the statutory interpretation of *Robinson* had redefined the burden of proof in constitutional terms. (A34). As such, the concurrence simply found that the *Robinson* error "must take precedence over a state's procedural concerns expressed in a contemporaneous objection rule". (A34). Rehearing en banc was granted on March 24, 1980. (A36).

The decision on rehearing en banc was entered December 12, 1980 and resulted in a 4 member plurality, 2 one judge concurrences and 3 separate dissents representing the votes of 4 judges. (A1). The plurality found error in that *Robinson* created a functional element of "absence of the affirmative defense" which the State was then required to disprove. (A9). Chief Judge Edwards in concurrence was of the view that due process per se required negation by the State of self defense (A10) and Judge Jones in a separate concurrence expressed approval of the panel decision. (A12). In dissent, Judge Lively disputed the contention of the plurality that Ohio had created a

new "element" of the crime. (A16). Judge Engel joined in this opinion as clarified by a subsequent order of the court (A23). Judges Merritt and Kennedy in separate dissents, (A20) and (A21), would have found waiver by the failure to object.

On December 31, 1980, the Court granted a stay of the mandate pending certiorari to this Court. (A37).

BELL

Bell was found guilty in a jury trial in Cuyahoga County, Ohio of murder, a lesser included offense of aggravated murder for which he had been indicted. On April 8, 1975, Bell was sentenced to a term of imprisonment of from 15 years to life. Like Isaac, Bell relied upon the affirmative defense of self defense and failed to object to the traditional jury instruction that he bore the burden of proof as to such defense by a preponderance of the evidence.

Subsequent to conviction, Bell appealed to the Court of Appeals of Cuyahoga County, Ohio. Therein, Bell raised no challenge to the instruction of self defense. The appeal was denied on April 8, 1975 (JA15). A subsequent appeal to the Ohio Supreme Court, again failing to raise any challenge to the self defense instruction, was denied on September 16, 1976.

On August 1, 1978, Bell filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Western Division. As a sole ground for relief, Bell raised for the first time, a due process challenge to the instruction given. On December 26, 1978, the district court issued an opinion and order denying the petition on the merits. (A49).[4]

Thereafter, Bell moved for reconsideration on the basis that the correct issue in controversy was the failure of the Ohio Courts to apply *Robinson* to him. On January 23, 1978, the district court issued a second opinion and order denying Bell's motion for reconsideration. (A56).

Upon appeal, The United States Court of Appeals For The Sixth Circuit on December 12, 1980, reversed on the authority of the en banc decision in *Isaac*. (A42). On December 31, 1980, the appellate Court granted a stay of the mandate pending certiorari review. (A48).

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[4]No transcript was submitted to the district court. The decision was rendered solely on the question of law presented by Bell.

HUGHES

Hughes was found guilty in a jury trial in Summit County, Ohio of the crime of voluntary manslaughter, a lesser included offense of aggravated murder for which he had been indicted. On January 27, 1975, Hughes was sentenced to a term of imprisonment of from 6-25 years. Like Isaac and Bell, Hughes relied on self defense at trial and raised no objection to an instruction that he bore the burden of proof of the affirmative defense of self defense by a preponderance of the evidence. (Hughes Tr. 342-343)[5] (JA45-46). In fact, and despite several objections to the instructions based on recent changes in Ohio law, (Hughes Tr. 348, 354), Hughes' counsel specifically requested the charge on self defense. (Hughes Tr. 288-289). (JA42). The charge was given over the State's objection. (Hughes Tr. 288-289). (JA42).

Subsequent to conviction, Hughes appealed to the Court of Appeals of Summit County, Ohio. Therein Hughes raised no assignment of error as to the validity of the instruction on self defense. As pertinent to a challenge to the weight and sufficiency of the evidence, the appellate court stated:

> The jury had sufficient evidence before it, including the testimony of the defendant, who testified to support his own defense. Little evidence, other than defendant's testimony, is shown of any aggressive overt act by decedent compelling or even inciting the defendant to the violent action he took of gunning down and killing Johnson. We reject Error No. 1. The jury had a right and did find against defendant's claim of self defense. . . .

(JA52) By order of September 24, 1975, the appellate court affirmed the conviction. (JA51). A subsequent appeal to the Ohio Supreme Court was denied on March 16, 1976.

On April 26, 1977, Hughes filed a petition for writ of habeas corpus with the United States District Court For The Northern District of Ohio, Eastern Division. As pertinent, Hughes alleged:

> The prosecution failed to prove that the accused was guilty as to each and every element of the offense charged and the trial court failed to so instruct the trial jury.

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[5]Reference to *State v. Hughes*, No. 74-11-1206, CCP, Summit County.

(Hughes' petition, page 4). Believing a weight and sufficiency allegation was being presented, a Return of Writ admitting exhaustion of state remedies was filed. Subsequent pleadings and a August 18, 1977 report and recommendation of a Magistrate that the writ be denied (JA24) clarified that Hughes was raising for the first time a challenge to the instruction. By orders of November 2, 1978 (JA40) and June 4, 1979 (JA38), the district court requested briefing on the question of exhaustion of state remedies and found exhaustion solely on the unavailability of further state appellate remedies. On June 26, 1979, the district court issued its opinion denying the writ on the alternative bases that Hughes' burden shifting claim had been waived by failure of objection and that the instruction itself did not violate federal due process. (A62).

On December 18, 1980, The United States Court of Appeals For the Sixth Circuit reversed on the basis of the *Isaac* decision. (A60). A motion to stay the mandate pending certiorari was granted on January 12, 1980. (A61).

STATUS OF THE PARTIES

During the interim of the proceedings in the courts below, Hughes and Isaac were first granted parole and then final releases as a matter of parole, (as opposed to final release by expiration of maximum sentence), and thus have served their sentences. Bell is still in prison.

SUMMARY OF ARGUMENT

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court set forth a two part "cause and prejudice" standard to be utilized in judging whether a state procedural waiver of a federal constitutional claim would be given deference in federal habeas corpus. In rejecting the conclusion of the district courts that "cause" had not been shown, three separate rationales were advanced by the appellate court. The view of the plurality in *Isaac v. Engle, supra* was that an objection would have been futile in light of well settled law. The appellate court however defined futility in such an expansive manner as to render the "cause" requirement a nullity. The appellate court adopted a view that the only purpose of a contemporaneous objection rule is to raise objections based on the then current state of the

law. Petitioners' position is that this view gives little or no credence to either the true role of counsel in our legal system or the validity of contemporaneous objection rules as legitimate procedural devices.

In *Wainwright*, this court noted that a trial should be the main event in the criminal law process. Contemporaneous objection rules are valid means to encourage that result. If "cause" however is limited to the failure to object to only known errors, there is little or no incentive to change the law. In the process the contemporaneous objection rule loses all meaning.

The concurrence of Judge Jones (A12) adopted the majority panel decision in *Isaac* that the failure to apply *State v. Robinson* to those who failed to object is arbitrary and capricious. Such view mistakes the notion of finality in our criminal process. It is also an unwarranted rejection of the direction given by this Court in *Hankerson v. North Carolina*, 432 U.S. 233 (1977). There is nothing arbitrary or capricious about drawing the balance between finality and constitutional right on the basis of those who have earned it. Our criminal system guarantees competent counsel and nothing more. It does not however guarantee that all defendants will get the benefits secured by the most able counsel. By equating "cause" with the failure of competent counsel to discover a change in the law, the panel returns to "deliberate bypass".

Judge Celebreeze's concurrence in the panel decision in *Isaac* (A33) took the view that a showing of prejudice could override legitimate state procedural concerns. This Court in *Wainwright* however adopted a "cause *and* prejudice" test. Judge Celebreeze's view merges the two components and eliminates "cause" as a *Wainwright* factor.

II.

In *Patterson v. New York*, 432 U.S. 197 (1977) this Court indicated that a State may consistent with due process place the burden of proof of an affirmative defense on a defendant. Following *Patterson*, petitioners contend that self defense may be labeled as an affirmative defense and the burden of proof allocated in the above manner. As a matter of state law, *Robinson* defined the burden of proof differently; as such, the instruction given was a violation of state law. The instruction

itself however did not violate federal due process. It was error with respect to a non constitutionally required instruction on a matter collateral to the existence or non existence of the elements of the crime.

In rejecting such view the appellate court construed *Robinson* to create a new functional element of "absence of the affirmative defense". This was a misconstruction of Ohio law. *State v. Poole*, 33 Ohio St. 2d 18 (1973). Even after *Robinson*, self defense remained an affirmative defense. Thus despite the *Robinson* error, no element of the crime was presumed.

ARGUMENT

I. WHETHER THE "CAUSE" REQUIREMENT OF *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977) FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND WHERE A FAILURE TO OBJECT TO AN INSTRUCTION PLACING THE BURDEN OF PROOF ON A CRIMINAL DEFENDANT OF THE AFFIRMATIVE DEFENSE OF SELF DEFENSE IS PREDICATED SOLELY ON THE FACT THAT THE DEFENDANT'S TRIAL OCCURRED PRIOR TO A STATE COURT DECISION WHICH RETROACTIVELY AND SOLELY AS A MATTER OF STATE LAW ELIMINATED THE DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES.

A. *WAINWRIGHT V. SYKES*

IN *Wainwright v. Sykes, supra*, this Court comprehensively addressed the question of what standard should be applied in obviating a state procedural default on a question of federal constitutional law. In rejecting the prior "deliberate bypass" test of *Fay v. Noia*, 372 U.S. 391 (1963), this Court attempted to reinject some notion of finality in our criminal law system:

> The failure of the federal habeas courts generally to require compliance with a contemporaneous-objection rule tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event. A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding; the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await

> their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification.
>
> We believe the adoption of the Francis rule in this situation will have the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be a determinative federal habeas hearing. There is nothing in the Constitution or in the language of Section 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings. If a criminal defendant thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection

Wainwright v. Sykes, supra at 90. By construing cause in the manner that it did, the appellate court has frustrated that goal:

> If, as this court holds, a change in the interpretation of the law provides "cause" for a defendant's failure to object at trial sufficient to satisfy the cause and prejudice exception of *Wainwright*, then the impact on the administration of justice of making that interpretation retroactive can never be mitigated by application of the state's contemporaneous objection rules.

(A22) Kennedy, J. dissent. It is thus to the various justifications, advanced by the appellate court that attention should be directed.[6]

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[6]The finding of "cause" allowed the appellate court to avoid a more direct challenge to *Wainwright*. As an initial response to *Wainwright*, the appellate court found it inapplicable to a state system which had a plain error review mechanism. This was true even if the State court had rejected the claim as "plain error". *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. denied*, 439 U.S. 955, *Canary v. Bland*, 583 F. 2d 887 (6th Cir. 1978), *Cook v. Bordenkircher*, 602 F. 2d 117 (6th Cir. 1979), *cert. denied*, 444 U.S. 936, *Rachel v. Bordenkircher*, 590 F. 2d 200 (6th Cir. 1978); *Krzeminski v. Perini*, 614 F. 2d 121 (6th Cir. 1980). In *Hockenbury v. Sowders*, 633 F. 2d 443 (6th cir. 1980), the appellate court retreated from such position—and rightly so. Such view of *Wainwright* is an unwarranted extension of the notion that a State may waive compliance with its procedural requirements and undercuts the purpose of the *Wainwright* decision—to give deference to legitimate state procedural concerns. It also runs contrary to

B. FUTILITY OF OBJECTION

The appellate court correctly noted that few Ohio counsel prior to *Robinson* objected to the traditional instruction on self defense. Few indications existed that O.R.C. Section 2901.05(A) had worked the change that it did. The Ohio jury instructions had not been amended, the committee notes that accompanied the statute reflected no change and various treatises reflected no variance wiith prior law. Similarly, in *State v. Rogers*, 43 Ohio St. 2d 28, 33 (1975), decided after O.R.C. Section 2901.05 had been enacted but prior to *Robinson*, the Ohio Supreme Court stated:

> The defense of using reasonable force to effect a citizen arrest necessarily involves an allegation of excuse and justification and is, therefore, an affirmative defense (R.C. 2901.05[c] [2]) which places the burden of going forward with the evidence upon the accused (R.C. 2901.05[A]) to prove that issue by a preponderance of the evidence.

What the appellate court did however was to equate the notion that any time there is a change in the law, there is futility of objection prior to such time.

In *O'Connor v. Ohio*, 385 U.S. 92 (1966), this Court rejected the notion that a contemporaneous objection rule could bar relief for an antecedent violation of *Griffin v. California*, 380 U.S. 609 (1965) which was applicable to the defendant's trial. *Tehan v. Shott*, 382 U.S. 406 (1966). In *O'Connor* however, the defendant's trial occurred prior to the Fifth Amendment even having been made applicable to the States. The predicate for the challenge had not been laid. In the present situation, O.R.C. Section 2901.05(A) had been enacted. All counsel were aware that Ohio had recodified its criminal law and procedure and some counsel had raised the issue and been successful on it.

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this Court's admonition in *Henderson v. Kibbe*, 431 U.S. 145 (1977), that challenges to a state court's instructions to the jury require a greater showing than "plain error". As applied to the present case, Ohio had clearly held that a *Robinson* error was waived, pursuant to Rule 30, Ohio Cr. R.P., by failure to object, and was not, pursuant to Rule 52(B), Ohio Cr. R.P., plain error. *State v. Humphries, supra; State v. Williams*, 51 Ohio St. 2d 112 (1977); *State v. Long*, 53 Ohio St. 2d 91 (1978); *State v. Slone*, 45 Ohio App. 2d 24 (CA Franklin, 1975).

State v. Robinson, supra.[7] Moreover, in a larger sense, the question of burden shifting is not new. The trial in *Isaac* occurred 3 months following *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and more than 5 years after *In re Winship*, 397 U.S. 358 (1970). As found by Judge Kennedy in dissent (A22), "although it may have been difficult to anticipate when the Ohio Courts would recognize that their procedure may violate *Mullaney* and *Winship*, or the exact manner in which the rule of those cases would be applied, the rule itself was not new or unanticipated". While the decision in *Robinson* may not generally have been anticipated, it was not unanticipatable.

The problem with the plurality's analysis is that it relieves counsel from any obligation to attempt to change the law and removes any possibility of waiver. Presumably if the objection is well known, the failure to make it will be deemed ineffectiveness of counsel. *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974). On the other hand, if the objection is not perceived until a subsequent decision is rendered, then "cause" is found in the lack of anticipation. Such interpretation renders *Wainwright* a nullity.

The law is frequently in flux and the path that it will take is unclear. This is hardly a reason to remove the requirement that a defendant make known his claims at trial. In *State v. Williams, supra* at 117, the Ohio Supreme Court succinctly stated:

> Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error.

The appellate court below itself recognized this in *Mars v. United States*, 615 F. 2d 704, 707, (6th Cir. 1980);

> As stated above, unless we accord retroactive application to the *Mauro* decision no violation of the IAD occurred in the present case. In light of our conclusions that appellant waived any IAD claim he may have had and that Section 2255 is not an appropriate vehicle to raise appellant's IAD claim, we need not decide whether *Mauro* should receive retroactive application.

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[7] In *State v. Robinson*, 48 Ohio App. 2d 197 (CA. Franklin 1975), the lower appellate court decision, the Court of Appeals noted that they were bound by their prior unreported decision in "*State v. Mathews*, No. 74 AP-428, decided December 24, 1974, ..." 48 Ohio App. 2d *supra* at 200.

Finally, it appears to be the better reasoned response of the various appellate courts.[9] *Cole v. Stevenson*, 620 F. 2d 1055 (4th Cir. 1980) (en banc); *Indiviglio v. United States*, 612 F. 2d 624 (2nd Cir. 1979), *cert. denied*, 445 U.S. 933 (1980); *Polizzi v. United States*, 550 F. 2d 1133 (9th Cir. 1976); *Dumont v. Estelle*, 513 F. 2d 793 (5th Cir. 1974). See particularly *Tyler v. Phelps*, 622 F. 2d 172 (5th Cir. 1980) [Decision on rehearing, 643 F. 2d 1095 (5th Cir. 1981)] where the appellate court upon rehearing changed its initial opinion and found an absence of cause. If the failure to object will be excused because objection was either unanticipated or thought futile, there is little incentive to either change the law or examine it for recent developments. Trials, once thought final, will be relegated to the position of a "tryout on the road". *Wainwright, supra* at 90.

C. RETROACTIVITY AND EQUAL PROTECTION

The panel decision in *Isaac*, approved by Judge Jones in concurrence on en banc hearing (A12) appeared to take the view that if a decision is held to be retroactive, it may not be limited to any class of persons affected by such decision. Such view mistakes that retroactivity has two components—the temporal aspects of the period to which it should be applied and the class of persons within such time frame to whom it should be applied. This Court has frequently struggled to adopt a unified theory of retroactivity as to both components. The temporal aspect need not be discussed here as the Ohio Supreme Court in *State v. Humphries, supra* held *Robinson* temporally applicable to all persons tried after the effective date of O.R.C. Section 2901.05A, —January 1, 1974. As to the class component, the suggestion has frequently been made that even though a decision is fully retroactive in time, it should be limited to appellate as opposed to collateral cases. *Williams v. United States*, 401 U.S. 646 (1971); *Mackey v. United States*, 401 U.S. 667 (1971). In more recent cases, however the balance between finality and constitutional right has settled not on whether the action was direct or collateral, but on whether the error was preserved. *Lee v. Missouri*, 439 U.S. 461 (1979); *Harlin v. Missouri*, 439 U.S. 459 (1979). Most recently, this Court stated in the context of the retroactivity of *Mullaney, supra:*

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[9]For a most recent example from this Court, see *Steagald v. United States*, ——U.S.——, 68 Led. 2d. 38, 44 N. 5(1981).

> The States, if they wish may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.

Hankerson v. North Carolina, 432 U.S. 233, 244 n. 8 (1977).

One irony of these cases is that Ohio's reliance on the above statement in *Hankerson* was found by the panel to be "arbitrary and capricious". (A31). *Hankerson* was dismissed as mere "dicta". (A27). The stated reason was that the panel found no rational relationship between applying a contemporaneous objection rule to a retroactive decision. The panel's view gives no credence to the role of counsel in our system.

Our system of jurisprudence guarantees competent counsel. It does not however guarantee that all counsel will be of equal capabilities. Some counsel will perceive a new issue and raise it, thereby changing the law. Others will not have such foresight. To have a rationale system of jurisprudence, it is simply not necessary, or perhaps even desirable, that our system insures each defendant the benefits secured by the most able. An example is this Court's decision in *Brady v. United States*, 397 U.S. 742 (1970). There, like here, a waiver of a claim was being challenged on the basis that a subsequent decision had changed the parameters of the law which existed at the time of the waiver. Yet in rejecting the notion that the waiver should be disturbed, the Court focused on the fact that when made the waiver was due in part to the actions of competent counsel. In doing so, the Court further rejected the notion that all defendants should get the benefit of a subsequent decision even though some defendants, who pursued the issue by trial and appeal would get such benefit.

In large measure, the "cause and prejudice" standard of *Wainwright* to be meaningful must be closely equated with the notion of ineffectiveness of counsel. If the failure of competent counsel to anticipate a new argument which some counsel do anticipate is "cause", then *Wainwright* returns to the "deliberate bypass standard" of *Fay v. Noia, supra*.

To justify the use of the *"Hankerson"* rule, this Court need look no further than the notion of finality in our criminal system. Under either of the major rationales of the appellate court below the result is devastating. Potentially the decision affects all Ohio defendants relying on affirmative defenses between 1974-1976. See also: *United States v. Frady*, 636 F. 2d 506 (D.C. Cir. 1980), *cert. pending*, No. 80-1595.

The holding of the appellate court below is even more disturbing in the sense that *Robinson* is a state statutory and not a constitutional law decision. Isaac never asserted that the Ohio Supreme Court needed to make *Robinson* retroactive and petitioners would adopt such view:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court though later overruled, are law nonetheless for intermediate transactions.

Great Northern R. Co. v. Sunburst Oil and Refinery Co., 287 U.S. 358, 364 (1932); See also: *Wainwright v. Stone*, 414 U.S. 21 (1973).[9] Moreover, if as asserted on the merits, *Robinson* was not constitutionally mandated for a fair trial, Ohio could have overruled *Robinson* when faced with the deluge. Rather than taking either of these extremes, Ohio chose to make *Robinson* retroactive to those who had preserved the error and to await the inevitable legislative amendment of O.R.C. Section 2901.05A. In drawing such line, there was nothing irrational or arbitrary in giving the benefit of *Robinson* to those who had earned it. *Dobbert v. Florida*, 432 U.S. 282 (1977); *Estelle v. Dorough*, 420 U.S. 534 (1975); *Schick v. Reed*, 419 U.S. 256 (1974); *Warden v. Marrero*, 417 U.S. 653 (1974).

D. WAIVER AS A FEDERAL QUESTION

Judge Celebreeze in his panel concurrence (A33) took a slightly different tact on the question of waiver. His view was that the issue on the merits was so intertwined with the fundamental reliability of fact finding as to override any state procedural concerns. (A34). Such view is an extension of *Henry v. Mississippi*, 379 U.S. 443 (1965) that in certain situations deference to state procedural rules should not be accorded. Petitioners do not dispute that waiver is a federal constitutional question. Nor do petitioners dispute that state procedural rules which serve no legitimate purpose may be overriden. In *Wainwright v. Sykes, supra* however, this Court stated the test as "cause *and* prejudice". Emphasis supplied. See *Tyler v. Phelps, supra*. Judge Celebreeze's test merges the two criteria—

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[9]The panel stated that it expressed no opinion on whether Ohio needed to make *Robinson* retroactive as a matter of federal constitutional law, (A26). Normally, the retroactivity of a new statutory interpretation is a matter of policy. *Halliday v. United States*, 394 U.S. 831 (1969), *Chevron Oil Co. V. Huson*, 404 U.S. 97 (1971).

if prejudice is shown, cause is irrelevant. Moreoever state contemporaneous objection rules are concededly legitimate, useful and desirable procedural tools. While thus phrased differently, Judge Celebreeze's test, like the en banc plurality, and Judge Jones reliance on the panel majority contravenes *Wainwright*.

II. WHETHER THE "PREJUDICE" REQUIREMENT OF *WAINWRIGHT V. SYKES, SUPRA*, FOR OBVIATING A STATE PROCEDURAL WAIVER MAY BE FOUND BY CONSTRUING, CONTRARY TO THE STATE COURT'S OWN INTERPRETATION OF ITS LAW, A STATE COURT DECISION ELIMINATING A DEFENDANT'S TRADITIONAL COMMON LAW ULTIMATE BURDEN ON AFFIRMATIVE DEFENSES TO CREATE A FUNCTIONAL ELEMENT OF THE CRIME OF "ABSENCE OF THE AFFIRMATIVE DEFENSE".

A. MISCONSTRUCTION OF STATE LAW

In *Brady v. Maryland*, 373 U.S. 83, 90 (1963), this Court aptly stated:

> We usually walk on treacherous ground when we explore state law [footnote omitted] for state courts, state agencies, and state legislatures are its final expositors under our federal regime.

See also: *Tennon v. Ricketts*, 574 F. 1243 (5th Cir. 1978), *cert. denied*, 439 U.S. 1091; *United States ex rel Almeida v. Rundle*, 255 F. Supp. 936 (E.D. Pa.), *aff'd.*, 383 F. 2d 421 (3rd Cir. 1967), *cert. denied*, 393 U.S. 863 (1964). By raising a question of error of state law to constitutional dimensions, the appellate court below failed to heed this admonition.

It must be noted that *Robinson* did not purport to be anything other than a state court decision construing state statutory law:

> Because our decision in this case is based upon Ohio statutory law, we need not consider whether *Mullaney* might constitutionally mandate a similar result.

Robinson, supra, at 113 n. 11. Thus while petitioners must admit that the instructions given were contrary to the subsequently announced decision in *Robinson*, nothing in such admission requires the conclusion that federal due process has similarly been violated. Not every error of state law is a violation of the constitution. *Beck v. Washington*, 369 U.S. 541 (1962); *Wainwright v. Stone, supra; Snowden v. Hughes*, 321

U.S. 1 (1943); *Milwaukee Electric Ry. Co. v. Wisconsin*, 252 U.S. 100 (1920); see also: *Bishop v. Mazurkiewicz, 634 F. 2d* 724 (3rd Cir. 1980).

Notwithstanding that *Robinson* was a state statutory decision, the appellate court found that *Robinson* itself created a federal due process question under *Mullaney*. This is perhaps the ultimate irony; *Robinson* was concerned with avoiding a potential "*Mullaney*" problem. In reaching this result, however the appellate court below found that *Robinson* created a new and functional element of the crime—"the absence of the affirmative defense":

> As we read *Mullaney* and *Patterson*, while the states are largely free to define crimes as they choose, fundamental fairness and therefore due process require that they prove the elements of the crimes as the states have chosen to define them beyond a reasonable doubt. We further conclude that once a state assumes the burden of proving the absence of an affirmative defense beyond a reasonable doubt, fundamental fairness and therefore due process require it to meet the burden that it chose to assume.

(A9). In the process, the appellate court below misconstrued Ohio law.

Self defense has traditionally been an affirmative defense under the law of Ohio. It is a device of confession and avoidance and, as such, the existence or non existence of the defense is wholly collateral to the elements of the crime:

> This court has consistently recognized that there are certain "justification(s) for admitted conduct" allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as "affirmative defenses". As characterized by one authority, they represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but rather, they represent a substantive or independent matter" which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true". Among those defenses in Ohio are self defense, duress, insanity, and intoxication.

State v. Poole, 33 Ohio St. 2d 18, 19 (1973); see also: *State v. Seliskar*, 35 Ohio St. 2d 95 (1973). Nothing in the enactment of O.R.C. Section 2901.05 in 1974 changed the characterization of self defense as an affirmative defense. While *Robinson* was intended to lessen the defendant's obligation to raise the

affirmative defense, it still remains collateral to the question of whether the elements of the crime have been proved. Ohio still labels self defense as an affirmative defense (O.R.C. Section 2901.05), the jury need not be instructed on a specific duty by the prosecution to prove the absence of self defense [*State v. Abner*, 55 Ohio St. 2d 251 (1978)], some burden remains on the defendant to raise the issue, failing which, the issue does not go to the jury [*State v. Robbins*, 58 Ohio St. 2d 74 (1979); *State v. Melchior*, 56 Ohio St. 2d 15 (1978)], and where the defense presents evidence that negates an element of the crime, such evidence may be inconsistent with the plea of self defense [*State v. Rogers, supra; State v. Champion*, 109 Ohio St. 28 (1924)]. To say that the absence of self defense, even after *Robinson*, relates to an element of the crime rather than a collateral matter would be a fundamental contradiction under Ohio law. *State v. Gall*, 65 Ohio App. 2d 57 (CA Greene 1980).

That the appellate court chose to rewrite Ohio law is most clearly seen by their failure to even cite *State v. Abner, supra*. In *Abner*, the Ohio Supreme Court rejected the contention that a defendant under *Robinson* was entitled to a specific instruction on the state's burden to disprove the absence of self defense. By doing so, the Ohio Supreme Court reaffirmed that even under *Robinson* self defense is an affirmative defense, not an element of the crime. As found by Judge Lively in dissent:

> The jury does not reach a defense of self defense until it finds that all elements of an offense have been established beyond a reasonable doubt.

(A18).

B. SELF DEFENSE

The proposition that *Robinson* is a state statutory redefinition with respect to a collateral matter is important. In finding a violation on the merits, the appellate court assumed that in any claim involving the shifting of the burden of proof, "prejudice" would be presumed:

> An error in the allocation of that burden, here shifting from the state its burden of proving absence of self defense beyond a reasonable doubt to the defendant to prove self defense by a preponderance of the evidence profoundly affects the basic fairness of a defendant's trial.

(A6). But CF *Hooper v. Perini*, 641 F. 2d 445 (6th Cir. 1981). Yet, a central tenet of petitioners' position is that *Robinson* is

not constitutionally required for a fair trial. Assuming the validity of such tenet, while an error of state law may have occurred, it did not undermine the fundamental fairness of the trial. *Robinson* may have worked a benefit on behalf of a criminal defendant. The question in these cases turns however not on whether some benefit would otherwise be withheld but on whether such benefit is constitutionally required. *Gosa v. Mayden*, 413 U.S. 665, 680 (1973); *United States v. Black*, 480 F. 2d 504 (6th Cir. 1973); *United States v. Peterson*, 611 F. 2d 1313 (10th Cir. 1979).

The starting point of analysis is *Mullaney v. Wilbur, supra*. In *Mullaney*, this Court held unconstitutional a Maine law placing on the defendant the burden of proving that, in killing a person, he had acted in the heat of passion. This court seemingly suggested that a state could not, consistent with due process, shift to the defendant the burden of demonstrating any fact which decreased the degree of culpability. Under this interpretation of *Mullaney*, the prosecution would be required to prove beyond a reasonable doubt the absence of any affirmative defense raised by the defendant, regardless of whether that affirmative defense negated an element of the crime.

Such a broad interpretation of *Mullaney* was rejected in *Patterson v. New York*, 432 U.S. 197 (1977). In that decision, this Court upheld the validity of a New York statute allocating to the defendant the burden of proving that he had killed a person while he was under the influence of extreme emotional distress:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Patterson, supra at 210. Following *Patterson*, it is simply not

fundamentally unfair to place the burden of proof of self defense on the defendant.

Judge Edwards, in concurrence in *Isaac* (A10) and Judge Merritt, in dissent (A23), adopted the view that self defense is irreconcilable with criminal intent and therefore due process is always violated by placing the burden of self defense on the defendant. Under *Patterson*, this is assuredly not the case:

> Allowing a State to treat self defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislative branch sufficient latitude to define mitigating factors that affect criminality.

Carter v. Jago, 637 F. 2d 449, 457 N. 6 (6th Cir. 1980)(petition for rehearing en banc pending)(A 69,82)[10]. See also: *Hankerson v. North Carolina, supra* at 245. (Blackmun, J. and Burger, C.J., concurring). An example is Bell. Bell was convicted of murder, in violation of O.R.C. Section 2903.02. As defined by the statute, the crime is "no person shall purposely cause the death of another". To claim self defense is not inconsistent with any of the elements of this crime. A person may act purposefully and justifiably at the same time.

In *Carter v. Jago, supra*, the same appellate court as decided the cases sought to be reviewed herein held in a pre 1974 trial, that the traditional common law instruction on the affirmative defense of self defense does not impermissably shift the burden of proof on the elements of crime. See also: *Krzeminski v. Perini, supra* at 124:

> *Patterson* makes it clear that so long as the jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self defense, extreme emotional disturbance or insanity upon the defendant.

This holding creates the bottom line analysis that a trial in Ohio in 1973 with the same instruction as given in these cases is constitutionally fair, whereas in these cases the instruction is constitutionally unfair. That the time parameters of the trial should make a difference in constitutional terms underscores the error of the court below.

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[10]Following the legislative amendment in 1978 of O.R.C. Section 2901.05A, the Ohio Courts have upheld the constitutionality of the traditional instruction. *State v. Howze*, 66 Ohio App. 2d 41 (CA Summit 1979).

In *Carter*, the appellate court correctly analyzed the dichotomy between this Court's decisions in *Mullaney, supra* and *Patterson v. New York, supra*. In *Mullaney*, the state had presumed the very factor—malice—which made a distinction between degrees of culpability as defined by the state law whereas in *Patterson*, the state bore the burden of proof as to each element of the crime; nothing required for a finding of criminal liability was presumed. See also: *Rivera v. Delaware*, 429 U.S. 877 (1976); *State v. Frost*, 57 Ohio St. 2d 121 (1979). The traditional instruction that failure of the affirmative defense did not relieve the state of its burden of proof as to the elements of the crime drew the same dichotomy. No element of the crime was presumed.

To be sure, changing the burden of proof on an affirmative defense may in some instances have an affect on the outcome of the trial. Because the change here however, dealt with a collateral matter to the elements of crime and was not of constitutional origin, a "presumed" prejudice test is inappropriate. *CF Hooper v. Perini, supra*. In rejecting that a *Robinson* error was "plain error" Ohio took the view that the defendant must show actual prejudice, *i.e.* that the result of his trial would have been different. *State v. Long, supra*. As applied to this error of state law, the prejudice component of *Wainwright* should be similarly construed. By failing to distinguish between changing the burden of proof on an affirmative defense and creating a new element of the crime, the appellate court committed error.

CONCLUSION

The decisions of the Courts below are erroneous as to both the "cause" and "prejudice" components of *Wainwright v. Sykes, supra*. As such, a reversal in each case is required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that the requisite number of copies of the foregoing Brief of Petitioners have been served on respondents Lincoln Isaac, Kenneth Bell, and Howard Hughes by forwarding such copies to the offices of their respective counsel, James R. Kingsley, 157 W. Main Street, Circleville, Ohio 43113 and Jay McKirahan, Suite 330, 22 East Gay Street, Columbus, Ohio 43215, counsel for Isaac; Richard L. Aynes, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Bell; and J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325, counsel for Hughes, by U.S. Mail, postage paid, this _____ day of June, 1981. I further certify that all parties required to be served have been so served. The respondents' addresses are Lincoln Isaac, 310 Ray Avenue, Circleville, Ohio 43113; Kenneth Bell, #141-727, Marion Correctional Institution, P.O. Box 57, Marion, Ohio 43302; Howard Hughes, c/o Beasley Surles, 163 Rhodes Avenue, Akron, Ohio 44302.

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